

Elizabeth M. Streit, Lead Trial Attorney
Scott R. Williamson, Deputy Regional Counsel
Rosemary Hollinger, Regional Counsel
Commodity Futures Trading Commission
525 West Monroe Street, Suite 1100
Chicago, Illinois 60661
312-596-0537
ES-2235
SW-9752
RH-6870

Paul Blaine
Assistant United States Attorney
for the District of New Jersey
Camden Federal Building & U.S. Courthouse
401 Market Street, 4th Floor
Camden, New Jersey 08101
856-757-5412
PB-5422

**In The United States District Court
For The District Of New Jersey
Camden Vicinage**

Commodity Futures Trading Commission,
Plaintiff,

vs.

Equity Financial Group LLC, Tech Traders, Inc.,
Tech Traders, Ltd., Magnum Investments, Ltd.,
Magnum Capital Investments, Ltd.,
Vincent J. Firth,
Robert W. Shimer, Coyt E. Murray, and
J. Vernon Abernethy,
Defendants.

Hon. Robert B. Kugler
District Court Judge

Civil Action No: 04-1512 (RBK)

CFTC's Memorandum In Support Of
Motion For Reconsideration Of Order
Denying Summary Judgment On
Violation Of 17 C.F.R. § 4.30.

MOTION DATE: February 2, 2007

TABLE OF AUTHORITIES

Cases

CFTC v. Savage, 611 F.2d 270 (9th Cir. 1979) 3
CFTC v. Vartuli, 228 F.3d 94 (2d Cir. 2000) 2
Commodity Trend Service, Inc. v. CFTC, 149 F.3d 679 (7th Cir. 1998)..... 2
In re Shahrokh Nikkhah, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶28,129
(CFTC May 12, 2000)..... 6

Statutes

7 U.S.C. § 1a(6) (2002)..... 2

Other Authorities

CFTC Interpretative Letter No. 75-11, [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH)
¶ 20,098 (Sept. 19, 1977)..... 2, 3
H.R. Rep. No. 963, 93rd Cong., 2nd Sess. 37 (1974)..... 2

Regulations

17 C.F.R. § 4.30 (2006) 1

Pursuant to Local Rule 7.1(i), Plaintiff Commodity Futures Trading Commission (“the Commission”) moves the Court to reconsider its December 18, 2006 Order denying the Commission’s motion for summary judgment on its claim that Defendant Robert V. Shimer aided and abetted Tech Traders’ violation of 17 C.F.R. § 4.30 (2006) [Docket Document 420] (“the Order”). The Court explained that it denied the Commission’s motion on this claim because the citations to the record the Commission submitted to support its claim that Tech Traders was a commodity trading advisor (“CTA”) did not directly establish the statutory elements necessary to meet the definition of a CTA. Specifically, the Court noted, the material the Commission cited did not affirmatively demonstrate that Tech Traders received compensation or profit for advising Shasta Capital Associates, LLC (“Shasta”) on its commodities futures trading. Order at 12. The Commission apologizes to the Court for its failure to cite to the Court the specific evidence that establishes this element of the statutory definition. The record does contain evidence that establishes each element of its claim, as set forth below.

Section 4.30 of the Commission’s Regulations provides:

No commodity trading advisor may solicit, accept or receive from an existing or prospective client funds, securities or other property in the trading advisor’s name ...to purchase, margin, guarantee or secure any commodity interest of the client.

The Court is correct that the Commission must first establish that Tech Traders was a CTA before it can prove that Tech Traders violated Regulation 4.30. A CTA is “...any person who for compensation or profit, engages in the business of advising others, either directly or through publications, writings, or electronic media, as to the value of or the advisability of trading in any contract of sale of a commodity for future delivery made or to be made on or subject to the rules of a contract market or derivatives transaction execution facility...” 7 U.S.C.

§ 1a(6) (2002). The Act's registration requirement for CTAs was intended to eliminate "undesirable practices" that had led to the loss of substantial amounts of money by unsophisticated traders. To protect both the investing public and this nation's commodity markets, it was decided that "all individuals who are involved either directly or indirectly in influencing or advising the investment of customer funds in commodities" be regarded as CTAs. H.R. Rep. No. 963, 93d Cong., 2d Sess. 37 (1974). Since futures trading is inherently risky and commodity prices are often volatile, a client's primary need is to know when to get into, and when to get out of, a particular market. As a consequence, the advice rendered by CTAs often is not individually tailored, but instead represents his or her analysis of where profit opportunities exist for virtually any client.

The CTA definition is construed liberally, and clearly applies to a person who makes trading decisions for any customer, including a commodity pool. *See generally* CFTC Interpretative Letter No. 75-11, [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,098 (Sept. 19, 1977). Thus, for example, one who provides commentaries, which include discussions of the underlying demand and supply trends that affect futures markets prices, opinions concerning price trends in futures markets and specific recommendations for positions to be taken in the futures markets for hedging purposes, is engaging in activities which implicate the statutory definition of CTA. *See, e.g., Commodity Trend Service, Inc. v. CFTC*, 149 F.3d 679, 689 (7th Cir. 1998). Similarly, persons who develop and sell commodity trading systems are engaged in activities within the statutory definition of CTA. *See, e.g., CFTC v. Vartuli*, 228 F.3d 94, 103 (2d Cir. 2000). The "furnishing" of advice implies direct as well as indirect provision, and it is sufficient if the compensation or profit results wholly or in part from the furnishing of

services. *CFTC v. Savage*, 611 F.2d 270, 279-80 (9th Cir. 1979), citing CFTC Interpretive Letter No. 75-11, ¶ 20,098 at 20,763 n.6.

In this case, the relationship between Tech Traders and Shasta's participants is much more direct – Tech Traders made the trading decisions for Shasta and did so for compensation or profit.

Exhibit 91, which is already in the record submitted with the Commission's summary judgment motion, establishes that Tech Traders advised Shasta about trading commodity futures trading and did so for compensation or profit. Exhibit 91 is an Investment Agreement between Tech Traders and Shasta dated July 6, 2001 and signed by Coyt Murray on behalf of Tech Traders and Vincent Firth as President of Equity Financial Group, LLC, Shasta's CPO. First, the Agreement describes how Tech Traders will advise Shasta about commodity trading by trading its money in accounts at futures commission merchants ("FCMs") in its name according to trading signals generated by its trading system. The Agreement thus states that "Tech has developed a certain 'portfolio' system for successfully trading the futures contracts of certain selected financial markets including the NASDAQ 100 and S&P 500 andTech has expressed its willingness to accept funds from Shasta and place those funds on Shasta's behalf with Tech's U.S. brokerage firm for the purpose of increasing Tech's credit lines..." Exhibit 91 at 1. In section III of the Agreement it states that "[a]ll funds received by Tech from Shasta shall be placed immediately with Tech's U.S. brokerage firms for the purpose of increasing Tech's credit lines for trading." Exhibit 91 at 2. Finally, in Section IX of the Agreement, entitled "Tech's Trading System.", the parties agree that Tech Traders "shall manage and trade the funds of Shasta using trading signals generated by Tech's Synergy Stock Index Portfolio Trading

System.... which takes a unique synergistic approach to the computerized trading of futures contracts...” Exhibit 91 at 5.

The Investment Agreement also shows that Tech Traders agreed to trade Shasta’s funds for compensation or profit. Section VII of the Agreement is entitled “Allocation of Profits” and sets out how “[p]rofits earned each and every calendar month by Tech on Shasta’s funds shall be allocated between Shasta and Tech...” Exhibit 91 at 3-4. Under this Agreement, Shasta was entitled to receive a share of profits that equaled 2% of Shasta’s beginning account balance at the beginning of the month. Exhibit 91 at 3.¹ Under Section VII D, Tech Traders and Shasta then agreed that if there was a profit remaining after this 2% preferential return to Shasta, “Tech shall be entitled to receive from any remaining profits and before any further allocation between the parties, an amount equal to 15% of the original amount of profits earned that month to cover Tech’s expenses of trading and operations.” Exhibit 91 at 4 (Subsection VII D entitled “Allocation of Profits for Expenses of Operation and Trading”). The Agreement further states under Section VII E entitled “Allocation of Remaining Profits Between the Parties” that “[u]pon allocation to Tech of an amount equal to 15% of profits as described above, any profits which remain shall be divided equally between the parties 50% to Shasta and 50% to Tech. Exhibit 91 at 4. This Agreement thus shows that Tech contracted with Shasta to receive 15% of profits after 2% was allocated to Shasta and 50% of the remaining profits.² Thus, the Agreement shows that

¹ This amount was reduced to 1% after June 30, 2003.

² For example, under this Agreement if Shasta invested \$100 and there was a 10% “return” for a month, the “profits” would be allocated as follows: \$110

- 2	to Shasta for preferential return
108	
-16.2	15% to Tech Traders
91.8	
45.9	to Tech Traders – 50%
45.9	to Shasta – 50%

Tech Traders agreed not only to advise Shasta on trading but to trade Shasta funds pursuant to its trading system and did so for profit³. This establishes that Tech Traders was Shasta's CTA.

Other evidence the Commission submitted also shows that Tech Traders made the trading decisions on all the funds under its control (Shimer Deposition at 693) and that Tech Traders used a portion of the funds it received from investors to pay its expenses, commissions and referral fees. (Bobo Affidavit at ¶ 8) This evidence shows that the CTA relationship established by the Investment Agreement was actually carried out, in that Tech Traders made all the trading decisions for investor money under its control and took investor funds as compensation, which was used to pay expenses, commission and referral fees.

As set out in the Commission's Memorandum, the evidence shows as well that Tech Traders violated Regulation 4.30 because it accepted money from third parties, and then traded those funds in accounts in its own name. (Firth Deposition at 348, Shimer Deposition at 696-97, McCormack Declaration at ¶7.) The evidence also shows that Shimer aided and abetted this violation because Murray and Shimer deliberately planned to trade Shasta's money in this way. It is undisputed that Shimer drafted the Investment Agreement that is Exhibit 91. See Shimer Deposition at 1023. The Investment Agreement states: "All responsibility for margin calls shall be the direct and sole responsibility of Tech and all accounts established with Tech's U.S. brokerage firm(s) even though such accounts may be initially established with funds of Shasta

As noted in the Commission's Memorandum in Support of its Summary Judgment Motion ("Memorandum"), Murray and Shimer entered into another secret agreement in which Murray agreed to allocate a third of the 15% profit share and half of its 50% profit share to Shadetree, a foreign trust Shimer set up to conceal these secret payments. See Memorandum at 8-9. See also Exhibit 96. However, Tech Traders still was entitled to receive 35% of the "profits" remaining after the 2% preferential return.

³ The profit allocation between Tech Traders and Shasta is also set out in the private placement memorandum ("PPM"). See Exhibit 49 at 6 "Trading Company Profits." Tech Traders' account statements also reflect the profit allocation. See Exhibit 466.

shall list Tech as the sole owner of the brokerage account.” Exhibit 91 at 10 (Section XX:” Trading Liability to be Solely Tech’s”). It is also undisputed that Shimer drafted the PPM (Answer at ¶¶ 29, 104, Shimer Deposition at 646), which also states that Shasta’s funds will be traded in Tech Trader’s name:

The Investment Agreement with the Trading Company shall set forth the terms and conditions for placement of Company funds into the Trading Company’s account with its U.S. brokerage firm. In addition to setting forth all terms and conditions which govern the division of profits (and losses) between the Company and the Trading Company (as described in this Offering Memorandum), the Investment Agreement performs the very important function of limiting the potential amount of the Company’s losses to the amount of its investment. **All funds traded pursuant to the Investment Agreement are traded solely in the name of the Trading Company.**

Exhibit 49 at 11(emphasis added.)

Thus, Shimer aided and abetted Tech Trader’s Regulation 4.30 violation because: 1) Tech Traders violated 4.30 by trading Shasta’s funds in its own name; 2) Shimer knew that Tech Traders was trading Shasta funds in its own name; and 3) Shimer intentionally assisted Tech Traders in committing this violation by drafting the PPM and the Investment Agreement which allowed Tech Traders to trade Shasta funds in its own name. *In re Shahrokh Nikkiah*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶28,129 at 49,887-49,888 and n.28 (CFTC May 12, 2000).

For all the reasons set forth above, the Commission respectfully requests that the Court reconsider its ruling denying the Commission’s motion for summary judgment on its claim that Shimer aided and abetted Tech Trader’s 4.30 violation.

Date: December 28, 2006

Respectfully submitted,

/s/Scott R. Williamson

Scott R. Williamson
Deputy Regional Counsel
A.R.D.C. No. 06191293

Elizabeth M. Streit
Lead Trial Attorney
A.R.D.C. No. 06188119

Commodity Futures Trading Commission
525 West Monroe Street, Suite 1100
Chicago, Illinois 60661
(312) 596-0537 (Streit)
(312) 596-0520 (Hollinger)
(312) 596-0560 (Williamson)
(312) 596-0700 (office number)
(312) 596-0714 (facsimile)